

# Orbán is Still the Sole Judge of his Own Law

---

Gábor Halmai

2020-04-30T20:59:32

Our [22 April post on the Verfassungblog](#) about Viktor Orbán's state of emergency generated a [thoughtful reply from Dr. Dániel Karsai](#), a well-respected Hungarian lawyer. We appreciate the chance to respond to his criticisms, alleging that we made some factual errors about the operation of Hungarian law.

One of these mistakes is that, as he correctly notes, the law prohibiting retroactive adjustments to gender in birth records for transsexuals is pending before the Parliament but hasn't been enacted yet. As Dr. Karsai also notes, however, the Parliament will most probably pass it soon. Our mistake is therefore temporary as it will soon be fixed by an act of the Hungarian Parliament.

The other mistakes that Dr. Karsai alleges are more serious, as they go to the heart of our argument that the constitutional framework that the government asserts constrain Orbán's use of emergency powers has been functionally disabled. First, he alleges that we underestimate the power of the Parliament to control Orbán because the Parliament can reverse an emergency decree with a simple majority.

Then, he asserts that the ordinary courts are up and running in a way that will surely generate challenges to Orbán's decrees up to the Constitutional Court. He also claims we have made too much of the fact that the military has been deployed to hospitals and strategic companies. We believe that he is wrong about each of these criticisms globally, even if he has found some small mistakes in the way we explained the law specifically in our earlier post. In fact, our conclusions have not changed. Orbán has no meaningful constraints on his power and the Hungarian Enabling Act has created a dictatorship.

## On Cardinal Laws and Supermajorities

We argued in our initial post that the Parliament would have to vote by two-thirds to remove the extraordinary power it just gave Orbán a month ago to override laws indefinitely. Dr. Karsai pointed out that Section 3 of the Enabling Act is not "cardinal" which means that it does not require two-thirds of the Parliament to amend it. We did rely on Section 3 of the Enabling Act in our initial piece, and Dr. Karsai is right that Section 3 is not cardinal, but we should have made more explicit in our analysis the role of Section 2 of the Enabling Act, which is a cardinal provision. Let us explain to those less well versed in Hungarian law than Dr. Karsai why our initial argument – that Orbán's powers can only be removed if two-thirds of the Parliament votes against him stands – because one must read Sections 2 and 3 of the Enabling Act together.

In Hungarian constitutional law, laws passed by Parliament come in two flavors: cardinal and ordinary. Cardinal laws, which provide more detailed regulation elaborating the meaning of constitutional provisions and which therefore are provided for in the constitution itself, can only be enacted or changed by a relative two-thirds majority (that is, a majority of the MPs present). Ordinary laws may be enacted or changed by a simple majority. We asserted in our original post that the Parliament could only reverse Orbán's decrees using the cardinal procedure; Dr. Karsai claims that we are wrong and that a simple majority will do.

Of course, Dr. Karsai agrees with us that Orbán presently controls two-thirds of the seats in Parliament and this Parliament is unlikely in practice to overturn any decree, even if the threshold were the lower one needed to change an ordinary law. So, for political reasons, Orbán's decrees are here to stay even if he loses a substantial amount of his support in Parliament. We all agree both on this practical fact and on the judgment that this poses a grave danger to the rule of law in Hungary.

But we want to defend our reading of the Enabling Act in which we believe that it would take a cardinal majority and not just an ordinary one to *reverse* one of Orbán's decrees. Dr. Karsai is right to say that Section 3 of the Enabling Act, which reserves to Parliament the ability to cancel Orbán's indefinite extension of his emergency decrees, is not by itself a cardinal provision. So the Parliament may refuse to extend the legal force of a specific decree of Orbán's with a simple majority.

Reversing the *substance* of a decree, however, is not as simple as that, and to show why, we need to get into the weeds of the Enabling Law by exploring the intersection of [Section 2 and Section 3](#). Section 2 is a cardinal part of the Enabling Act (as defined in Section 9 of the Act), and that's the part that gives Orbán the power to "suspend the enforcement of certain laws, depart from statutory regulations and implement additional extraordinary measures by decree." Parliament can only roll back *that* power with a two-thirds vote. Section 3 gives Parliament the power to "withdraw [from the government] the authorization [to extend the effect of decrees] before the end of the emergency." But note that Section 3 – the non-cardinal part of the law – only allows the Parliament to reverse its grant of power to Orbán in allowing the decrees to maintain their legal force indefinitely. It does not affect the grant of power, given in the cardinal part of the law in Section 2, to issue those decrees in the first place.

If the Parliament were to withdraw its approval for an indefinite extension of a particular decree with a simple majority under Section 3, Orbán could simply reissue the very same decree again, using his powers in Section 2 of the Enabling Act. The grant of power in Section 2 allows Orbán to override any law by decree – and therefore he could also override a simple-majority law that the Parliament would pass to refuse an extension of the initial decree! In our view, the continued effect of Orbán's emergency decrees rests on both Section 2 and Section 3, which is why Parliament cannot eliminate the effects Orbán's decrees with a simple majority. Parliament needs a two-thirds majority to properly control Orbán's new powers given to him in Section 2 of the law.

To show how this works, let's take one of Orbán's decrees – for example, the one we mentioned that gives the Minister for Innovation the power to gain access to the personal data of any Hungarian, which is a direct violation of the EU General Data Protection Regulation (GDPR) and its direct effect in Hungary. Let's assume that the Parliament decides that allowing the government unlimited access to anyone's personal data is too dangerous a power for the government to have. For example, the Parliament might suddenly realize that there is no bar (as there isn't in the decree) on the one minister authorized to receive such private data passing it on to the whole Cabinet or to anyone else for that matter. And suppose that a newly concerned Parliament votes by simple majority to refuse to extend this decree longer than the 15 days that are set as a limit in [the Fundamental Law](#) in Article 53.3. Section 3 of the Enabling Act allows Parliament to refuse to renew this decree after 15 days. That's what Dr. Karsai has argued, and he's right as far as he goes. That particular decree would then cease to have legal force.

But by refusing to extend a decree of Orbán's (even assuming that Parliament would do it), the Parliament has not stopped Orbán from giving unlimited personal data access to the Innovation Minister. If Orbán wants to continue this arrangement, all he has to do is to reissue the decree again as soon as the Parliament cuts off the effect of the earlier decree. In fact, Orbán can keep doing that as long as he likes.

The power to issue the decree in the first place, and to override any provision of Hungarian (or European) law in doing so, rests on Section 2 of the Enabling Act, which is a cardinal provision of the law requiring a two-thirds vote of the Parliament to change. All Parliament can do by using its power under Section 3 of the Enabling Act is to make it slightly more complicated for Orbán because he would have to keep reissuing the same decree anew every 15 days. But Parliament cannot overturn the substance of the decree itself with a simple majority; it can only refuse to extend this particular decree's effects while Orbán can simply issue a new decree with the very same content. And given the powers Parliament conferred on Orbán in Section 2, Orbán can also override any attempt by the Parliament to control him under Section 3. One can of course argue that a democratic head of government respecting the rule of law would not reissue a decree after its continued effect has been cut off by the Parliament. But the Hungarian government has shown in the last decade that there is nothing that deters them if they need to do something to keep their power.

In our original blogpost, we didn't get into this level of detail about the precise way that the Enabling Law works. We did assert that Section 3 was cardinal when it is not – and should have instead pointed to Section 2, which is cardinal, in grounding Orbán's power to issue decrees in the first place, rather than in Section 3, which simply allows Orbán to extend the effects of the decree beyond 15 days. Dr. Karsai was right to call us out on that. But we submit that the bottom line of our analysis remains the same – and in fact once we focus on the broad grant of power given in the *cardinal* section of the law – in Section 2 – Orbán's powers become even more alarming because he can also simply override any action taken by the Parliament under Section 3. Parliament cannot stop Orbán with a simple majority, but only by a two-thirds majority.

## On the Operation of the Hungarian Courts

Dr. Karsai, after pointing out correctly that the Hungarian courts were in fact closed for the first two weeks of the emergency, greeted Decree 74/2020 with some enthusiasm. This decree ended the extraordinary suspension of judicial proceedings introduced after 15 March by introducing a number of measures that allow for remote hearings, introduction of electronic evidence and changed deadlines that allow the courts to keep working as the emergency goes on. The courts are now more or less operating as usual, as Dr. Karsai says. We all agree that this is surely better than the sudden closure of courts that occurred at the start.

After consulting with a number of our colleagues who are practicing law in the Hungarian courts, we learned that they, like Dr. Karsai, don't see the problems with the decree that we did. They attest to the fact that the decree only modifies forms of evidence and deadlines for different phases of the proceedings, and does not change the usual procedures fundamentally. One procedural change that is new with the emergency is the procedural limitation to the ordinary operation of courts in Decree 105/2020 on the reduced working time during emergencies, which does not provide any possibility of appeal. In addition, the decree eliminates the role of lay judges in first-instance proceedings, so that a single professional judge will act alone during the emergency. This can be problematic, especially in employment law matters. Our worries about the decree stem more from the fact that it is hard to trust both the public prosecutor and many judges after a decade of assaults on the independence of both so we immediately see potential for abuse in any grant of discretion to them. These problems existed before the emergency and one might say truthfully that the emergency did not make things markedly worse.

But here, too, our global point is unchanged. The Hungarian government has been saying that, [because the Constitutional Court remains open, Orbán's power is controlled](#) in a normal constitutional way. But the Constitutional Court has adopted a very cramped view of its jurisdiction in constitutional complaints. Under the rules since 2012, individuals have to show that they have been concretely harmed by a legal norm, and they have to start in the ordinary courts, only appealing to the Constitutional Court when they have not had their rights vindicated in the lower courts. But individuals rarely win at the Constitutional Court.

According to the Act on the Constitutional Court, a successful challenge to the constitutionality of a legal norm requires a 'direct involvement' of the complainant claiming the violation of his/her rights by one of the decrees. As common knowledge tells us, and as Dr. Karsai often litigating before the Constitutional Court must have experienced, the Court has always been very restrictive in interpreting whether or not a complainant has demonstrated direct involvement, and it is very unlikely that it will make exceptions now, because as Karsai himself admits „in politically sensitive cases they never interfered with the government.” He's not alone in thinking this. As a number of scholarly studies have shown, the Constitutional Court in Hungary has become a reliable rubber-stamp for the government ever since it was captured in 2013.

## There is No Junta – but There is Abuse of Rights

Dr. Karsai dismisses as a “media show” the fact that military commanders have been installed in each hospital and that small detachments of soldiers have been deployed to 150 strategic companies. But the bottom line regarding the role of the army is also that neither the Fundamental Law or the law on the management of natural disasters gives power to the government to make extraordinary rules concerning the army.

Not living in Hungary, we cannot attest first-hand to the visibility of the military on the streets, but we know that the military can play an important and undesirable role even when it stays barracks, as it was the case with the Soviet army between 1956 and 1991.

The few remaining independent journalists in Hungary are starting to dig into just what it means for the military to be installed throughout the hospitals and economy, and the answer is alarming. A [detailed report in Index.hu by Gergely Brückner](#), one of the most highly respected economic journalists in Hungary, found that the soldiers were in fact quite active in the “strategic companies” to which they have been posted. While on balance the civilian management of these companies claimed to appreciate the way that the soldiers have enabled rapid communication with the government by unblocking supply chains, guaranteeing financing and organizing logistics, the civilian managers also noted with alarm that the soldiers seemed most interested in gathering the personal data of both employees and clients, as well as the intellectual property of the companies. It is notable that all of the civilian managers, despite saying that things were fine (except for the drip of data out the door), spoke anonymously. They clearly do not feel free to go on the record about just what the military are doing inside their companies.

In fact, the Orbán government has not only been unconstitutionally gathering a lot of personal data during the emergency (through the decree that gives the Innovation Minister the ability to access all private data without limit and through the exfiltration of data out of the strategic companies by the military), but it has also been hoarding information of general relevance that transparent and democratic governments should release. As Dr. Karsai himself admits, the government does not provide public access to the relevant information regarding COVID-19 cases. Among other things, because briefings with the Emergency Task Force are not held in person, journalists must send in questions ahead of time and the government answers only selectively. Many important questions are never answered.

Journalist are not only denied these data of public interest, but they are also threatened by new criminal sanctions, what we did not include in our last post because we wrote about this separately earlier ([here](#) and [here](#)). The Enabling Act inserted two new crimes into the Criminal Code, which will not disappear when the emergency is over. Anyone who „claims or spreads a distorted truth in relation to the emergency in a way that is suitable for alarming or agitating a large group of people” can be punished for a term of up to five years in prison. While so far no journalists have apparently been the target of this law, sources for journalists are. Virtually no one in the hospitals will speak on the record to journalists. We’ve already seen how nervous company directors are in speaking for the record about the actions of



the military in their companies. [Lt. Col. Róbert Kiss](#), speaking for the government's Emergency Task Force, announced on Monday 27 April that 74 people had been charged already under this law.

Another permanent crime inserted into the criminal code by the emergency law punishes anyone who obstructs the operation of measures that the government takes to fight the pandemic with up to five years in prison, eight if someone dies as a result. Monday's briefing by Lt. Col. Kiss indicated on Monday that 281 people had been charged with crimes related to the pandemic.

Between these laws, a clearly unconstitutional, disproportionate threat to freedom of expression exists. Not only are those who, in the view of the government, are „distorting” the truth in Hungary punished, but so is anyone who, in the government's view, interferes with the measures taken during this emergency, which affects civil society organizations in Hungary who have strongly condemned Orbán's emergency decrees. These criminal measures create a repressive atmosphere in which the possibility of dissent has been curtailed.

## **The Emergency is Unconstitutional**

We might note in closing that Dr. Karsai failed to make three obvious points which provide the backdrop to any proper analysis of the Hungarian Enabling Act and the decrees that Orbán is issuing every day. The first is that, due to the special construction of the Hungarian legal system, every measure that has been taken by the government to protect the country against the coronavirus so far could have been taken without declaring a state of emergency. The government could have instead used the existing powers in Act CXXVIII of 2011 on Emergency Management and Act CLIV of 1997 on Health. Thus, while other countries may have had to introduce emergency measures to create a blanket curfew or to order stores to close, Hungary already had those powers built into its ordinary law, precisely to be used in a pandemic. (Actually, the general curfew was already ordered in Hungary in a perfectly legal manner before Enabling Act was passed.) Hungary therefore needed no additional emergency powers to cope with the virus. Any state of emergency that grants blanket powers with few limitations should be treated with suspicion under any circumstances, even more so when there is not even a pretense that it is necessary at all.

The second obvious point is that this whole unnecessary Hungarian emergency framework is unconstitutional, violating Orbán's own 'illiberal constitution.' Under the current Fundamental Law, drafted and passed with only the support of the governing party in 2011, states of emergency are highly elaborated, and they require oversight of the government's use of emergency powers. But Parliament crippled its own oversight capabilities in the Enabling Law, thus violating the constitution.

Third, the Orbán government already has a history of misusing emergency law. Back in 2015, at the height of the migration crisis, Orbán insisted on being given new emergency powers. [Parliament passed a law that](#) gave Orbán the power to declare a 'state of migration emergency' which allowed him to hunt down and detain asylum

seekers, punish those who assisted them and to use draconian new standards for rejecting asylum claims. The 2015 emergency law included sunset conditions that should have ended the emergency when the flow of refugees stopped. But here we are, nearly five years later with hardly a new refugee in sight, and Orbán has renewed these emergency powers continuously through to the present day. We fear this bodes ill for the future of the pandemic emergency law which did not specify sunset conditions at all.

While Dr. Karsai identified some technical points in our earlier posts that needed fine-tuning, and we are grateful for his careful reading of our work, these corrections do not affect our conclusions. Indeed, addressing Dr. Karsai's criticisms allowed us to find even more alarming elements both in the way that the emergency in Hungary is legally constructed and in the way that Orbán's decree powers are being used.

Orbán is using his emergency powers to do almost everything except fight the virus.

While we appreciate Dr. Karsai's intervention, his analysis does not lead us to be any less concerned about the fate of the rule of law and democracy in Hungary. We believe that Donald Tusk, former Polish Prime Minister and now President of the European People's Party (EPP), the party group at European level to which the Hungarian governing party, Fidesz at least temporarily belongs, [was right when he claimed](#) that Adolf Hitler's jurist and prominent Nazi legal scholar Carl Schmitt would be proud of Hungarian Prime Minister Viktor Orbán. Carl Schmitt famously defended Hitler's emergency measures by saying: The *Führer* protects the law (*Der Führer schützt das Recht*). And that's the situation we have in Hungary. Viktor Orbán is the sole judge of his own law.

